



keyboarding activities associated with her job with respondent caused or aggravated her carpal tunnel syndrome.

2. What is the nature and extent of claimant's injuries and disability? Claimant alleges the 10 percent impairments to her upper extremities from C. Reiff Brown, M.D., are the most credible. Additionally, claimant contends Dr. Lucas failed to utilize the fourth edition of the *AMA Guides*,<sup>1</sup> as is required by K.S.A. 44-510d. Finally, claimant contends that respondent has failed to rebut the presumption that claimant is permanently and totally disabled under K.S.A. 44-510c(a)(2) and *Casco*.<sup>2</sup>

#### FINDINGS OF FACT

Claimant worked for respondent as a reservation agent, which required that she enter cruise bookings, pull up information on a computer and enter data up to 8 hours per day, 5 days per week. At the time of the regular hearing, claimant was 72 years old, with a high school education, and had been working mostly office work her entire life. In early 2007, claimant began having pain in her hands and arms. This was reported to claimant's supervisor, and claimant was sent to Mark S. Dobyns, M.D., for an evaluation. Dr. Dobyns had claimant undergo a nerve conduction test which displayed moderate to severe carpal tunnel syndrome bilaterally. Claimant was then referred to Dr. Lucas, with the first examination on October 15, 2007. Claimant displayed pain in both hands and wrists and was diagnosed with bilateral carpal tunnel syndrome. Claimant advised the doctor that driving exacerbated her wrist complaints. A left carpal tunnel release was performed on February 1, 2008. Claimant reported an improvement in the numbness in her left hand, but some soreness and weakness remained. Claimant elected to not undergo the same surgery on her right hand at that time.

Claimant returned to her regular job with respondent and began missing work due to the pain in her hands and arms. The pain in claimant's upper extremities was getting worse. Claimant returned to Dr. Lucas on March 28, 2008, with a sudden onset of pain, numbness and swelling in her right hand. Dr. Lucas noted no complaints in claimant's left hand at that time. After a period of conservative care, claimant elected to undergo a carpal tunnel surgical release to her right upper extremity on October 21, 2008. After the surgery, claimant reported the numbness on the right side was gone. Claimant still had soreness at the operative site. After the surgery, claimant returned to work for respondent and worked until December 19, 2008. Claimant testified that she stopped working at that time because she could not work anymore. Claimant told her boss that she was retiring because she could no longer do the data entry due to the problems with her hands.

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

Dr. Lucas last examined claimant on January 19, 2009. At that time, claimant had no numbness on the right side with a little bit of weakness and soreness in her left hand. Claimant advised that she had retired from her job with respondent. The physical examination performed by Dr. Lucas on claimant displayed no sensory deficits on either side, Tinel's was negative bilaterally, claimant's grip strength was fair and there was no atrophy. Dr. Lucas determined that claimant had reached maximum medical improvement (MMI) and rated her at 5 percent to the right hand and 2 percent to the left hand pursuant to the fourth edition of the *AMA Guides*.<sup>3</sup> However, on cross-examination, Dr. Lucas acknowledged that his use of the *AMA Guides* was not as definite as originally stated. Dr. Lucas used the *AMA Guides* as a consult. Most of the time, he made a judgment of the impairment out of his head, based on his experience. He agreed that, in his opinion, the ratings from the *AMA Guides* were too high. Dr. Lucas agreed that he did not assess claimant's grip strength, and there were no specific grip strength measurements in claimant's medical file. Of the activities described by claimant outside respondent's job, including the fact claimant crocheted regularly, Dr. Lucas found keyboarding to be the least significant in the development of carpal tunnel syndrome.

Claimant was referred by her attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on April 14, 2009. Dr. Brown determined, from the history provided by claimant, that the type of work activity claimant did at respondent could cause or aggravate bilateral carpal tunnel syndrome. Dr. Brown was provided no information regarding any hobbies claimant had or any activities outside of work. At the time of the examination, claimant was experiencing tingling and numbness at night, which had been reduced by the prior surgeries. Claimant also described intermittent numbness during the day, which had also been reduced by the surgeries. Dr. Brown thought that claimant's grip strength was moderately decreased bilaterally and he found no atrophy. Dr. Brown assessed claimant a 10 percent impairment bilaterally to her upper extremities based on the fourth edition of the *AMA Guides*,<sup>4</sup> table 16, page 57. Dr. Brown opined that claimant should not return to the type of work she was doing at the time of the injury.

At the time of the regular hearing on June 17, 2009, claimant was not working and was receiving Social Security and a small retirement from USF&G, the insurance company claimant once worked for. Claimant testified to ongoing pain bilaterally, reduced grip strength, the inability to lift anything heavy, and the inability to open jars or crochet, and she is limited in her ability to garden. Claimant testified that while the numbness in her upper extremities had improved after the surgeries, the pain and loss of grip strength was actually worse.

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<sup>3</sup> *AMA Guides* (4th ed.).

<sup>4</sup> *AMA Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>8</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>9</sup>

Respondent argues that claimant has failed to show a work-related accident or injury as it relates to claimant's employment with respondent. Respondent contends claimant's outside activities, including crocheting, gardening and even driving, caused the

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<sup>5</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>8</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>9</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

bilateral carpal tunnel syndrome. Respondent argues that the insult from claimant's data entry for respondent is only responsible for a small fraction of the damage leading to the carpal tunnel syndrome, and, therefore, under K.S.A. 44-501(a), this slight insult would not be sufficient to qualify as personal injury by accident arising out of and in the course of claimant's employment with respondent.

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.<sup>10</sup>

Both Dr. Brown and Dr. Lucas testified that the work for respondent caused some aggravation to claimant's bilateral carpal tunnel syndrome. A mere aggravation is all that is required in Kansas for a work accident to be compensable. Here, claimant's activities for respondent were sufficient to cause an aggravation of the condition, thus, making claimant's accidental injuries compensable under the Kansas Workers Compensation Act.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>11</sup>

Dr. Lucas initially testified that he utilized the fourth edition of the AMA *Guides*<sup>12</sup> in determining claimant's bilateral upper extremity impairments. However, on cross-examination, he admitted that he actually used his past experience in determining the impairment ratings, using the AMA *Guides* only as a consultation tool. His actual impairment ratings were sort of pulled "out of my head, I guess, based on my experience."<sup>13</sup> Dr. Lucas felt that the ratings from the AMA *Guides* were too high. He went on to acknowledge that he did not actually utilize a table out of the AMA *Guides* when determining claimant's upper extremity ratings.

Dr. Brown, on the other hand, utilized the AMA *Guides*, identifying Table 16, page 57 of the fourth edition as the basis for the 10 percent impairments given to claimant's bilateral upper extremities. The Board finds that Dr. Brown followed the mandate of the statute and properly utilized the AMA *Guides* in determining the proper rating for claimant from this accident. Dr. Lucas did not. Therefore, the 10 percent

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<sup>10</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>11</sup> K.S.A. 44-510e(a).

<sup>12</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>13</sup> Lucas Depo. at 12-13.

permanent partial impairment of function to each upper extremity, as determined by the ALJ, is affirmed.

K.S.A. 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.<sup>14</sup>

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.<sup>15</sup>

Moreover, in *Casco*<sup>16</sup>, the Kansas Supreme Court determined that earlier decisions did not follow the literal language of the Act. The Court wrote:

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.<sup>17</sup>

If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful

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<sup>14</sup> K.S.A. 44-510c(a)(2).

<sup>15</sup> *Casco*, *supra*, at Syl. ¶ 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at Syl. ¶ 6.

employment, the claimant's award must be calculated as a permanent partial disability.<sup>18</sup>

Claimant testified to being forced to quit her job with respondent as the result of pain in her upper extremities. Dr. Brown acknowledged that claimant's job with respondent was no longer appropriate employment for her. Therefore, in this instance, a presumption of permanent total disability has been created in claimant's favor. The burden to rebut that presumption falls squarely on respondent. As noted in *Casco*, failure to rebut that presumption results in an award of permanent total disability compensation. Here, respondent has failed to provide evidence to show claimant has the ability to engage in substantial and gainful employment. The presumption has not been rebutted and the award shall be modified to grant claimant a permanent total disability.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a permanent total disability, but affirmed in all other regards.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 22, 2009, should be, and is hereby, modified to award claimant an award of permanent total disability, but affirmed in all other regards.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Dorothy M. McComb, and against the respondent, Royal Caribbean Cruise Lines Ltd., and its insurance carrier, Ace American Insurance Company, for an accidental injury which occurred on September 21, 2007, and based upon an average weekly wage of \$442.86.

Claimant is entitled to 8.57 weeks of temporary total disability compensation at the rate of \$295.25 per week totaling \$2,530.29, followed by permanent total disability compensation at the rate of \$295.25 per week not to exceed \$125,000.00.

As of January 19, 2010, there is due and owing to claimant 8.57 weeks of temporary total disability compensation at the rate of \$295.25 per week totaling \$2,530.29, followed by 113.00 weeks of permanent total disability compensation at the rate of \$295.25 per week in the sum of \$33,363.25, for a total due and owing of \$35,893.54, which is ordered

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<sup>18</sup> *Id.* at 528.

paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$89,106.46 is to be paid at the rate of \$295.25 per week until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge